able and worthy of credit, because, although the witness had made a contradictory statement he had made another statement similar to those to which he had testified before a jury. *Com. v. Jenkins*, 10 Gray 485.

A man untruthful out of court is likely to be untruthful in court. Since the self contradiction is conceded, it remains a damaging fact, and it is in no sense explained away by the consistent statement. It is just as discrediting if once uttered, even though the other story has been consistently told a score of times *Kipp v. Silverman*, 25 Mont. 295.

Although the above side of the question as to the inadmissibility of such statements is supported by an overwhelming weight of authority, yet the courts which hold to the doctrine based on the admissibility of such consistent statement are not entirely void of reason. The admissibility of such evidence rests on the obvious principle, that as conflicting statements impair, so uniform and consistent statements sustain and strengthen his credit before a jury. This reasoning, however, is not true to generally accepted principles. All will concede that an untruth leaves its mark on the character of the publisher and no amount of good done by the person can clear the character of that blemish. In as much as this applies to every day affairs of life, why depart from the principle simply because it is being acted upon in legal proceedings? In some jurisdictions such a statement is admitted for the purpose of sustaining the credibility of the witness, but not for the purpose of confirming his statement as to the facts sworn to by him at the trial. *State v. Parish*, 79 N C. 610.

Even in those jurisdictions where consistent statements are allowed, the courts are unwilling to announce the doctrine unqualifiedly, but hedge the principle about with innumerable refinements.

NOVATION DISTINGUISHED FROM ACCORD WITHOUT SATISFACTION.

The tendency of the courts is to favor compromise agreements, and to support their terms wherever possible. The question, however, whether the compromise agreement will be considered as a novation, or as an accord without satisfaction is often times of great difficulty to determine. If a novation, the new contract completely extinquishes the old and forms the basis of further settlement. If it is an accord without satisfaction, the old contract survives and its terms may be enforced

In *Bandman v. Finn*, decided June 21, 1906, in New York Court of Appeals on an appeal from the Appellate Division (89 N. Y. App. 504), Cullen, Ch. J reviews this question. Here there was an unmatured and contingent obligation, for which the plaintiff had no cause of action. The parties had agreed for a settlement by the payment of a smaller amount than that contemplated upon the happening of the contingency. Such an agreement, it was held, constituted a novation and the plaintiff

was not allowed to recover on his original obligation. Haight J., *dissenting.*

The common conception of a novation is that of an agreement whereby a third person is substituted to the rights and liabilities of one of the original contractors. The form of novation here treated is that of a substitution of a new agreement for an old one, the parties remaining the same. In a novation there must be an extinguishment of the original obligation by the substitution of a new contract. A cause of action on contract or tort may be extinguished by an agreement between the parties There is no need that this agreement which is the consideration for the satisfaction should be executed; it may be executory. If the subsequent agreement is accepted in satisfaction, and this appears expressly or by implication, the original cause of action is merged and extinguished. *Kromer v. Heim*, 75 N. Y. 574. A new contract inconsistent with the original impliedly discharges the latter without express provision to that effect. *Renard v. Sampson*, 12 N. Y. 561; *Stow v. Russel*, 36 Ill. 18.

If one having a debt or claim against another, satisfies or releases it in consideration of an executory promise by the debtor, he cannot afterward enforce his original cause of action upon a mere failure of the other party to perform his promise, for he has a remedy to compel performance. *Morehouse v. Second N. B.*, 98 N. Y. 503. A promise itself constitutes sufficient consideration to support a new agreement. *Nassoiz v. Tomlinson*, 148 N. Y. 326. It is not, therefore, material whether the disputed claims were valid or not. *Wehrum v. Kuhn*, 61 N. Y. 62; *Flegal v. Hoover*, 156 Penn St. 276. But the claims must have been bona-fide. Cases collected, 2 Ed. Clark on Cont. 125.

Accord and satisfaction is an agreement between two parties to give and accept something in satisfaction of a right of action which one has against the other, which when performed is a bar to all actions upon this account (*Bouvier's Dict.*) The original obligation must be an existing obligation and continue until complete execution of the new agreement. If the execution of the new agreement fails the original obligation survives. *Hearn v. Kiehl*, 38 Penn. St. 146. While a new agreement may not discharge a prior contract the performance of the new agreement will do so. *Rogers v. Rogers*, 139 Mass. 440; *Thompson v. Poor*, 147 N. Y. 402. Where an accord is relied on it must be executed; readiness to perform is not sufficient, nor is part performance adequate. An accord must always be entirely executed and not executory in any part. 2 Parsons on Cont. 193; *Russel v. Sytle*, 6 Wend. 390. Where a novation is relied, on failure to perform does not subject the party to liability under the old original debt or claim. It does not work the hardship which failure to perform an accord often does, and for this reason is encouraged by the courts. Accord and satisfaction when it consists in the substition of a new contract for an old one, and the substituted contract is accepted without performance as a satisfaction of the old

contract, is a novation. (Note to *Harrison v Henderson*, 67 Kan 194) in 100 Am. St. Rep. 393.)

The courts in every case try to carry out the intention of the parties manifested by the compromise agreements, and as intimated above lean towards construing doubtful cases as novations, rather than accords without satisfaction. The interests of justice are thus considered better maintained.

This matter of privileged communication is of great antiquity, and is one of the safeguards that both the American and English courts have seen fit to throw about private affairs, and to preserve inviolate the confidential relations of patients with their physicians and clients with their lawyers. It is a safeguard similar to that recognized in criminal cases where no inference is allowed to be drawn from the failure of the accused to take the stand. To allow any inference to be drawn either favorable, or unfavorable, from a refusal to waive the privilege of a confidential communication to a physician is only to nullify the effect of such a provision. It is true that the privilege is susceptible of great abuse, but the very strict construction of the rule, given to it by the Appellate Division, in doing away with this evil, tends to cause a much greater evil by practically abolishing the privilege itself.

The text books and the other states uphold the decision of the Circuit Court of Appeals and Wigmore in his work on Evidence, Sec. 2386 specifically says: "When the privilege is claimed by a patient who is a party, no inference as to the facts suppressed can be drawn" and the Supreme Court of Indiana in *Hackney, et al. v. Foyce, et al*, 156 Ind. 535 holds that: "The purpose of the statute has its roots in public policy, and is intended to promote that confidence and full disclosure often absolutely necessary to a correct treatment of the patient, and which may be withheld under impending danger of publication. * * * Shall the efficacy of the statute be destroyed by indirection? To claim the protection of the statute is the legal right of a patient, or his representative, and of no less inviolability than any other personal right, and it is wholly inconsistent with that right to say that its exercise in a judicial proceeding shall be allowed to prejudice the cause of him who claims it." On grounds of logic and reason, the Appellate Division should adopt this rule of evidence sanctioned by the general consensus of judicial opinion, but the court closes its eyes to these considerations and justifies under *stare decisis*.